No. 88-1966

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IN THE

Supreme Court of the United States

October Term, 1988

PATRICK M. ZILL,
Petitioner,

vs.

AVIS RENT-A-CAR SYSTEM, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT AVIS RENT-A-CAR SYSTEM, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Petitioner filed suit in the Common Pleas Court for Franklin County (Columbus), Ohio and Respondent removed the action to the United States District Court for the Southern District of Ohio. Thereafter, after discovery was completed, Respondent filed a Motion for Summary Judgment on a number of grounds including that Petitioner was "an employee at-will" and therefore could be terminated by Respondent for any reason provided Respondent did not violate the law. The District Court granted the Motion for Summary Judgment finding that Petitioner was "an employee at-will".

Petitioner thereupon filed an appeal with the U.S. Court of Appeals for the Sixth Circuit and, after briefs were filed and oral argument held, the Court of Appeals affirmed the Summary Judgment granted by the District Court. It is from this affirmance by the Court of Appeals that Petitioner has filed the instant Petition for Writ of Certiorari.

ARGUMENT

I. THERE WAS NO DENIAL OF DUE PROCESS WHEN THE DISTRICT COURT GRANTED SUMMARY JUDGMENT IN FAVOR OF RESPONDENT WITHOUT A HEARING BECAUSE THERE WERE NO GENUINE ISSUES OF MATERIAL FACT AS TO WHETHER AS A MATTER OF LAW PETITIONER WAS AN EMPLOYEE AT-WILL AND WAS PROPERLY DISCHARGED FOR FAILING TO OBEY THE RULES AND REGULATIONS OF HIS EMPLOYMENT.

A. This Court Has Recently Stated That Summary Judgment Is a Favored Procedure Where a Party With The Burden of Proof Cannot Produce Evidence That Would Withstand a Directed Verdict.

The purpose of summary judgment under Rule 56 of the Federal Rules of Civil Procedure is to avoid an unnecessary trial when there are no issues of material fact. *Chore-Time Equipment, Inc. v. Cumberland Corp.*, 713 F.2d 774, 779 (Fed. Cir. 1983). Summary judgment is "properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules", which as a whole are designed "to secure the just, speedy and inexpensive determination of every action." *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 2555 (1986) quoting Fed. R. Civ. P. 1.

The standard for determining whether to grant summary judgment is clear from the language of Rule 56(c):

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with

> the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Although the moving party has the initial burden of showing an absence of an issue of material fact:

> . . . [r]ule 56(e) itself provides that a party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 2514 (1986).

In *Anderson*, the Supreme Court stated that the standard for summary judgment "mirrors" that for a directed verdict under Rule 50(a) of the Federal Rules of Civil Procedure. *Id.* at 2511. The court held that "the inquiry involved in a ruling on a motion for summary judgment or for a directed verdict necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits." *Id.* at 2512. In other words, the proof offered in opposition to a motion for summary judgment must be sufficient to meet the standard of proof which would be required to sustain a verdict after trial.

B. The District Court Properly Granted Summary Judgment in Favor of Respondent.

The District Court reviewed the relevant pleadings, discovery materials, and affidavits and properly determined that there was an absence of a genuine issue of material fact and that a fair-minded jury could not return a verdict for Petitioner (Judgment Entry of June 28, 1988, p. 3, See Appendix A3 to Petition for Writ of Certiorari).

The District Court correctly found that Petitioner was an employee-at-will and he could be discharged at any time for any reason not prohibited by law or for no reason at all. *Mers v. Dispatch Printing Co.*, 19 Ohio St. 3d 100 (1984). After carefully reviewing the evidence presented, the District Court concluded:

> (Petitioner's) employment with (Respondent) is an at-will employment which can be terminated for any or no reason by either party. Moreover, (Petitioner) cannot modify his status of an at-will employee by either of the available exceptions.

(Judgment Entry of June 28, 1988, p. 5, See Appendix A3 to Petition for Writ of Certiorari).

It is well-settled in Ohio that, unless otherwise agreed, either party to an oral employment-at-will agreement may terminate the employment relationship for no reason or any reason not contrary to law. *Id.* Ohio courts have made clear that a policy manual or handbook that is merely suggestive or which simply sets forth guidelines, cannot rise to the level of a contractual limitation on the right to discharge an at-will employee. *Davis v. Edwin Shaw Hospital*, Case No. 12365 (Summit County (Ohio) Court of Appeals, May 14, 1986) (unreported) and *Czerkas v. United States Steel Corp.*, Case No. 3823 (Lorain County (Ohio) Court of Appeals, November 13, 1985) (unreported). Moreover, to the extent that statements contained in a policy manual or handbook constitute unilateral policy statements, they have no contractual effect. *Turner v. SPS Technologies, Inc.*, Case No. 51954 (Cuyahoga County Court of Appeals, June 4, 1987) (unreported). Accordingly, the District Court correctly granted summary judgment in favor of Respondent.

C. The Granting of Summary Judgment in Favor of Respondent Without a Hearing Was Not a Denial of Due Process.

It is not a denial of due process for a trial court to grant summary judgment without providing a hearing to the parties. See, for example, *Dayco Corporation v. Goodyear Tire and Rubber Company*, 523 F.2d 389 (6th Cir. 1975) wherein the Court of Appeals held that it is discretionary for the trial court to grant an oral argument "on application and proper showing". In the case at bar, Petitioner did not request oral argument.[1] See also *Sarelas v. Porikos*, 320 F.2d 827 (7th Cir. 1963) wherein the Court stated:

> "There is no merit to the contention that the District Court denied Plaintiff due process or equal protection of the law so as to render the District Court judgment void."

Accordingly, there was no error in the District Court or Court of Appeals on this issue.

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[1] Rule 4.0.4 of the Rules of the U.S. District Court for the Southern District of Ohio provided that "On any motion for summary judgment, a party will be deemed to have waived a hearing on the motion unless a request for hearing is filed within ten (10) days of the time of filing or the expiration of time for filing a memorandum in opposition to the motion."

D. This Court Should Not Review the Allegation That Respondent "Extend(ed) Itself in a Dual Capacity Towards (Petitioner And) Ha(d) a Duty to Perform as Mediator" Because Petitioner Raised That Issue For the First Time in This Petition For Writ of Certiorari.

The Supreme Court should not be asked to rule upon an issue in an appeal which was never before raised in the District Court or Court of Appeals. This has been the rule of this Court for many years. See *Blair v. Oesterlein Mach. Co.*, 275 U.S. 220 (1927) and *Miree v. DeKalb County, Ga.*, 97 S. Ct. 2490, 433 U.S. 25 (1977) wherein this Court declared that where an issue has not been pleaded, argued or briefed either in federal district court or in Court of Appeals it would not be considered by the United States Supreme Court on a grant of certiorari. See also *Pennsylvania R. Co. v. Illinois Brick Co.*, 297 U.S. 447 (1936) and *Urie v. Thompson*, 69 S. Ct. 1018 (1949) for similar holdings. This "issue" never having been raised in any court below, Petitioner should not be permitted to raise it at this time.

II. THE DISTRICT COURT DID NOT ERR IN FINDING THAT PETITIONER WAS NOT WRONGFULLY DISCHARGED NOTWITHSTANDING THE FACT THAT RESPONDENT DID NOT APPEAL FROM THE DECISION OF THE OHIO BUREAU OF EMPLOYMENT SERVICES ("OBES"). THE DECISION OF THE OBES WAS NOT *RES JUDICATA.*

The findings of the Ohio Bureau of Employment Services ("OBES") regarding just cause for discharge did not bind the District Court in the wrongful discharge action because the issues before the District Court and the OBES were not the same. *Distelzweig v. Hawkes Hospital of Mount Carmel,* 34 Ohio App. 3d 277 (1986) and *Cooper v. City of North Olmsted,* 795 F.2d 1265 (6th Cir. 1986). The District Court properly ignored the OBES finding concerning "just cause" in light of the fact that Respondent did not need "just cause" to discharge Petitioner. Thus, the OBES findings, determined in a non-adversarial forum, were irrelevant.

The issue raised in the OBES proceeding—whether there was "just cause" to terminate Petitioner's employment—was not part of the trial court proceeding because Respondent could terminate Petitioner "for any reason which is not contrary to law". *Mers, supra,* at 103. Moreover, the OBES finding was not "judicially affirmed" and was non-adversarial in nature, no hearing having taken place. Respondent did not oppose Petitioner's attempt to obtain benefits through OBES, and therefore, the OBES decision did not preclude summary judgment.

III. THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING PETITIONER'S MOTION TO AMEND HIS COMPLAINT.

Almost three years after filing his original Complaint, and shortly before the scheduled trial date, Petitioner filed a Motion for Leave to Amend his Complaint to add an additional claim for alleged past due sales commissions. The District Court denied Petitioner's Motion finding:

> 1. The claim for commissions could have been raised initially in the case. At the present time the trial is less than a month away and discovery has been completed.
>
> 2. The claim to be added has nothing to do with the wrongful discharge claim.
>
> 3. The plaintiff can obtain relief for this claim in an alternate forum.

(Decision Entry of January 6, 1988, See Appendix A8 to Petition for Writ of Certiorari).

The Federal Rules of Civil Procedure allow amendments to pleadings to be "freely given when justice so requires." Fed. R. Civ. P. 15(a). However, a trial court's decision to grant or deny leave to amend will be overturned only for abuse of discretion. *Guthrie v. J.C. Penney Company, Inc.*, 803 F.2d 202, 210 (5th Cir. 1986). A trial court, in determining whether to allow an amendment, must consider such factors as undue delay in filing the motion, bad faith by the moving party, undue prejudice to the opposing party, and the futility of the amendment. *Podlesnick v. Airborne Express, Inc.*, 94 F.R.D. 288 (S.D. Ohio 1982).

In applying these standards, the District Court did not abuse its discretion in denying Petitioner's leave to amend his Complaint. Although Petitioner filed his original Complaint on March 15, 1985, he did not seek leave to amend his Complaint until January, 1988. Petitioner's additional claim for past due commissions was known to him when he originally filed his lawsuit and was not a product of newly discovered evidence (Trial Court's Entry of January 6, 1988, See Appendix A8). The District Court properly determined that, with the trial just a month away and discovery completed, Respondent would be unduly prejudiced if Petitioner was allowed to amend his Complaint to add a new cause of action.

Generally, to constitute an abuse of discretion, there must be "a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors." *Schmidt v. Herrmann*, 614 F.2d 1221, 1224 (9th Cir. 1980) citing *Anderson v. Air West, Inc.*, 542 F.2d 522, 524 (9th Cir. 1976). The District Court weighed the relevant factors and reached a sound conclusion. Certainly the District Court's decision cannot be considered an abuse of discretion.

Moreover, the District Court's denial of Petitioner's Motion for Leave to Amend his Complaint was not properly preserved for appeal either before the Court of Appeals or this Supreme Court. Petitioner appealed to the Court of Appeals from the Judgment Entry of June 28, 1988 which entered summary judgment for Respondent, but did not appeal from the January 6, 1988 Entry denying Petitioner leave to amend his Complaint. For that reason, this Court should not even review this issue at this late date.

CONCLUSION

For the reasons set forth above, Respondent respectfully requests this Honorable Court to dismiss Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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